

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 17, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP905  
STATE OF WISCONSIN**

Cir. Ct. No. 2007CV82

**IN COURT OF APPEALS  
DISTRICT II**

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**DANIEL J. GOECKNER,**

**PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

**V.**

**MARK E. CARSTENSEN,**

**DEFENDANT-APPELLANT-CROSS-RESPONDENT,**

**MARK CARSTENSEN CONSTRUCTION & DEVELOPMENT COMPANIES AND  
MARK E. CARSTENSEN CONSTRUCTION, INC.,**

**DEFENDANTS.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. This case arises out of a commercial dispute between a doctor and his former patient concerning their joint venture to develop real property. On appeal, the former patient, Mark E. Carstensen, contends that the circuit court erred in granting summary judgment on his professional negligence claim against Dr. Daniel J. Goeckner.<sup>1</sup> Goeckner cross-appeals, arguing that the circuit court erred in entering its costs judgment after the conclusion of trial on the remaining claims.

¶2 We conclude that the circuit court erred in granting summary judgment on Carstensen's professional negligence claim against Goeckner. Because we reverse and remand so that a trial can be held on that claim, we decline to address the costs judgment. After Carstensen's claim is resolved and the case is completed, the circuit court can enter a new costs judgment.

¶3 Goeckner is a psychologist who treated Carstensen for a variety of issues, including depression, stress, and anxiety. Carstensen was a successful building contractor and real estate developer.

¶4 Goeckner's formal treatment of Carstensen began in March 1999 and ended in July 2003. During this time, the two men entered into a business relationship involving the development of real property. Eventually, the relationship soured and this litigation ensued.

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<sup>1</sup> Alternatively, Carstensen contends that the circuit court erroneously exercised its discretion when it denied his motion to vacate the partial summary judgment, which was filed after trial. Because we agree with Carstensen that the court erred in granting summary judgment on his professional negligence claim, we do not address this alternative argument.

¶5 In February 2007, Goeckner filed a complaint against Carstensen, alleging, among other things, breach of contract, breach of fiduciary duty, breach of duty of good faith and fair dealing, and conversion. In April 2007, Carstensen filed an answer and counterclaims, which included a claim for professional negligence involving Carstensen's treatment by Goeckner for psychological issues.

¶6 Goeckner subsequently moved for partial summary judgment on the ground that the three-year statute of limitations barred Carstensen's claim for professional negligence. The motion was accompanied by Goeckner's affidavit in which he swore that the last time he treated Carstensen was late July 2003.

¶7 Carstensen opposed the motion for partial summary judgment with an affidavit of his own that read as follows:

While Dr. Goeckner stopped providing formal treatment to me on or around July 22, 2003, after that date, I am certain that Dr. Goeckner continued to informally treat me for, *inter alia*, depression, stress, and anxiety until at least early 2005. These informal treatments occurred primarily at my office.

¶8 The circuit court initially denied Goeckner's motion for partial summary judgment. However, after additional discovery was conducted, the court granted it, despite recognizing that there was a dispute as to the date of Goeckner's last treatment of Carstensen. In so doing, the court appeared to weigh the strength of Carstensen's affidavit, observing, "There are questions, but they are not material questions warranting the submission of this issue." Accordingly, it dismissed the professional negligence claim.

¶9 The parties' remaining claims went to a jury trial. Ultimately, the jury returned a verdict in favor of Carstensen, and the circuit court entered judgment upon it. This appeal follows.

¶10 We review de novo the grant or denial of summary judgment, employing the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).<sup>2</sup> In deciding if genuine issues of material fact exist, we draw all reasonable inferences in favor of the nonmoving party. *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

¶11 Here, we agree with Carstensen that the circuit court erred in granting summary judgment on his professional negligence claim. As noted, Carstensen submitted an affidavit, indicating that informal therapy with Goeckner continued into 2005. Contrary to Goeckner's assertion, this statement was not a conclusion or opinion that was not supported by evidentiary fact. Rather, it was an evidentiary fact based on Carstensen's personal knowledge and experience. Drawing all reasonable inferences in favor of Carstensen, we conclude that the affidavit created a genuine issue of material fact as to the date that Goeckner last provided treatment to Carstensen. That genuine issue of material fact remained despite the parties' subsequent discovery. Therefore, the court should have permitted Carstensen's professional negligence claim to proceed to trial. Because it did not, we reverse and remand for further proceedings.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

*By the Court.*—Judgment reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5.

